

***United States Court of Appeals  
for the Second Circuit***



**APPELLANT'S  
PETITION FOR  
REHEARING  
EN BANC**



74-1029

In the  
UNITED STATES COURT OF APPEALS  
FOR THE Second Circuit

Docket No. 74-1029

UNITED STATES OF AMERICA,  
Plaintiff-Appellee

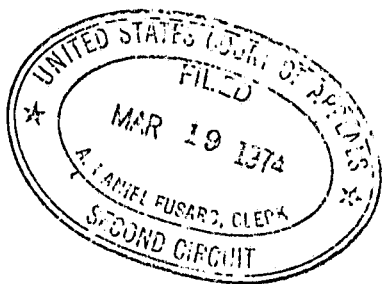
vs.

JOHN P. CLEARY  
Defendant-Appellant

Petition for Rehearing En Banc

On Appeal From The United States District Court  
For The District of Vermont At Criminal  
Action No. 73-37

Petition for, JOHN P. CLEARY, Appellant



Peter M. Cleveland, Esq.  
Myers and Cleveland, Inc.  
Attorney for Defendant-Appellant  
John P. Cleary  
Box 123  
Essex Junction, Vermont 05452

UNITED STATES COURT OF APPEALS  
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA	)	
Plaintiff-Appellee	)	
	)	
v.	)	Docket No. 74-1029
	)	
JOHN P. CLEARY,	)	
Defendant-Appellant	)	

PETITION FOR REHEARING EN BANC

PRELIMINARY STATEMENT

John P. Cleary, Defendant-Petitioner herein respectfully petitions this Court for a Rehearing En Banc of its decision of March 5, 1974 in the above entitled case.

In an opinion by Judge Hayes, the Court held:

"An order having been entered herein on January 7, 1974 directing that the appellant shall file his brief and appendix to the brief on or before February 8, 1974 in default of which the appeal shall be dismissed,

And said brief and appendix not having been so filed,

Upon consideration thereof, it is

Ordered that the appeal from the judgment of the United States District Court for the District of Vermont be and it hereby is dismissed."

March 5, 1974

STATEMENT OF FACTS

Notice of appeal to the Second Circuit U.S. Court of Appeals

from a Judgment dated November 26, 1973 was filed November 26, 1973. The transcript of the proceeding below was ordered promptly (see appendix 1,2 and 3 attached) and Counsel was advised that the Court Reporter would not have the transcript available until February 19, 1974.

By Order dated January 7, 1974, this Court ordered the Brief for Appellant to be filed by February 8, 1974 and oral argument to be heard on March 13, 1974. Motions to enlarge the time for filing Briefs which were filed January 29, 1974 and February 1, 1974 were denied. A motion to adjourn the argument was similarly denied February 7, 1974.

The transcript of over 800 pages was received by counsel on February 20, 1974. Appellant's Brief and Appendix was prepared and ready to be filed and served on Appellee on March 12, 1974.

A Motion to Strike the Dismissal of Appeal and to Reconsider the Motion for Enlargement of Time, prepared and hand delivered on March 7, 1974 which was the same day counsel received notification of this Court's March 5, 1974 Order, was denied.

#### POINT 1

The nature of the Defendant's grounds for appeal were such

that the Defendant had to exhaustively search the transcript in order to prepare his argument. Further, the whole transcript was necessary to prepare this appeal as it depended on the total evidence introduced by both sides plus the instructions and post trial motions. The issues on appeal dealt with the sufficiency of the evidence and with the applicability of the Trial Judge's charge as it is related to the testimony during the course of the trial.

Defendant's Brief and Appendix was prepared and ready to be filed within twenty (20) days of counsel receiving the transcript. However it was essential to Defendant's appeal that the transcript be meticulously reviewed before the Brief could be written.

While, the Court never had before it a Motion to Enlarge the Time for Docketing the Appeal for reasons that the transcript was not finished, the Defendant's Motion for Enlargement of Time to File the Brief and Motion to Adjourn the Argument conveyed the reasons for his inability to prepare the Briefs on time.

The Court should look to the content and substance of Defendant's Motions rather than the form, and substantial justice requires that the Court hear the Appeal on the merits. The Defendant should not be denied the right to be heard on the merits of an Appeal, which is neither frivolous or dilatory,

when the substance of reasons for Defendant's inability to have his brief prepared on time were both timely before the Court, and not within his control to correct.

## POINT II

For the reasons and facts recited in the Statement of Facts and Point I, Defendant has been denied the due process of law to which he is entitled under the Constitution of the United States, and further has been denied the effective use of counsel as also guaranteed under the Constitution.

The inability of counsel to prepare an effective brief without the transcript cannot be over stressed. Defendant's briefed arguments as to the correctness of the Judgment Order rendered by the Trial Court required the total transcript, the completion of which Defendant could not control.

To expect the Defendant to be able to control the official court reporter's activity is of itself unreasonable. To further expect Defendant and his counsel to effectively brief what he believes to be substantial error below without the transcript denies him due process under the law and his right to counsel.

### POINT III

This Court has the power to suspend the rules under rule two of the Federal Rules of Appellate Procedure and reinstate the appeal with an opportunity for appellee to submit his Brief and for oral argument.

Rule 2 is partially designed to relieve litigants of the consequences of default where manifest injustice would otherwise result. As the reinstatement of Defendant's Appeal does not fall into the category of prohibited suspensions mentioned in the rule, the Court clearly has the power to do so.

Where as here, the Defendant could not control the preparation of the transcript; where the transcript was absolutely essential to the preparation of Defendant's Brief; where Defendant's Brief was prepared and served only twenty days after the receipt of the transcript; where the Defendant's Appeal on representation to the Court is neither frivolous or dilatory; where Defendant is ready to proceed at the Court's pleasure with filing the Brief and oral argument and where the Defendant is not incarcerated, in would be a manifest injustice not to reinstate Defendant's Appeal and hear oral argument on the merits of the matter.



### CONCLUSION

For all of the reasons set forth above and in our papers previously submitted and on file with this Court, John P. Cleary's Petition should be granted. The Orders should be reviewed by this Court En Banc and Defendant's Appeal should be reinstated to be heard on the merits.

Respectfully submitted,

*Peter M. Cleveland*

Peter M. Cleveland, Esq.

Myers and Cleveland

Attorney for Petitioner

Box 123

Essex Junction, Vermont 05452

December 13, 1973

Edward J. Trudell, Esq.  
Clerk, United States District Court  
Federal Building  
Burlington, Vermont - 05401

Re: U.S.A. v. John P. Cleary  
Docket No.: 73-37

Dear Mr. Trudell:

I have spoken with the Assistant United States Attorney, William Grey, and as far as the exhibits are concerned, it is my understanding that all of the exhibits, with the exception of the two guns and two boxes of ammunition, should be made part of the record on appeal.

I made initial arrangements with the reporter on the day I filed the Notice of Appeal for a transcript. I also filled out the requisite forms given to me by you. I subsequently received a copy of a memorandum from Herman J. Vesper, the Court reporter. From reading the memorandum, I understand that the order has not been finalized until payment is made. I spoke to my client regarding this matter and payment and the reporter's form will be mailed on Monday, the 17th.

Any delay in this matter was unintentional and only a matter of not knowing what finalizing the transcript order was. I trust this will meet with your satisfaction.

Very truly yours,

Peter M. Cleveland

PMC:jbl

UNITED STATES DISTRICT COURT  
For The  
DISTRICT OF VERMONT

P.O. Box 105  
Brattleboro, Vt., 05301  
14 February 1974  
(Date)

From: Herman J. Vesner (#532-12-9520)  
Official Court Reporter  
U. S. District Court  
District of Vermont

To: Peter M. CLEVELAND, Esquire  
26 Railroad Avenue  
Box 123  
Essex Junction, Vermont

SUBJECT: STATEMENT OF SERVICES in re: U.S.A. vs. JOHN P. CLERRY

One (1) ORIGINAL Transc., ( 821 ) pages @ \$1.00 page...\$ 821.00

One (1) CARBON Transc., ( 821 ), pages @ .40 per page...\$ 328.40

TOTAL.....\$ 1149.40

Less Deposit...\$ 800.00

AMOUNT DUE:....\$ 349.40

TRANSCRIPT IS NOW READY FOR DELIVERY UPON RECEIPT OF BALANCE.  
BALANCE IS NOW DUE.

UNITED STATES DISTRICT COURT  
FOR THE  
DISTRICT OF VERMONT

-----)  
THE UNITED STATES OF AMERICA )

VS )

JOHN P. CLEARY )  
-----)

CRIMINAL ACTION #73-37

AFFIDAVIT

HERMAN J. VESPER, OFFICIAL COURT REPORTER, U.S. DISTRICT COURT FOR THE DISTRICT OF VERMONT, HAVING BEEN DULY SWORN DEPOSES AND SAYS:

FINALIZED ORDER FOR TRANSCRIPT IN ABOVE-CAPTIONED CASE RECEIVED BY ME FROM ATTORNEY PETER H. CLEVELAND, ON 19 DECEMBER 1973, AT WHICH TIME I INDICATED MY ESTIMATE FOR SOONEST POSSIBLE DELIVERY OF TRANSCRIPT WOULD BE 19 FEBRUARY 1974.

SINCE THAT TIME, DUE TO VERY HEAVY COURT DOCKET OF FIVE FULL DAYS PER WEEK, PLUS ONE HALF DAY PER WEEK SPENT IN TRAVELING, COUPLED WITH COMPLETE AND ABSOLUTE LACK OF TRANSCRIBERS IN THIS STATE, IT IS ABSOLUTELY AND IRREVOCABLY IMPOSSIBLE FOR ME TO ACCOMPLISH THIS TRANSCRIPT SOONER THAN 19 FEBRUARY, IN FACT, IN VIEW OF COURT SCHEDULE JUST RECEIVED, I ESTIMATE THAT IT WILL BE IMPOSSIBLE FOR ME TO COMPLETE IT IN THAT AMOUNT OF TIME.

DETAILS OF THE TRANSCRIPT SITUATION OF THIS REPORTER WERE GIVEN TO MR. SWEENEY, ADMINISTRATIVE OFFICE, U.S. COURTS, WASHINGTON, D.C. LAST SUMMER AND THE SITUATION HAS NOT CHANGED.

THIS REPORTER FEELS VERY STRONGLY THAT FEDERALLY EMPLOYED TRANSCRIBERS SHOULD BECOME AN ACTUALITY IN THIS STATE AND AS FAR AS I AM CONCERNED, ALLOW FOR THE GOVERNMENT TO COLLECT THE TRANSCRIPT FEES, FOR I SEE NO RELIEF IN MY PORTION OF VERMONT TO COME IN THE NEAR FUTURE.

THIS REPORTER IS PRESENTLY TRAINING HIS DAUGHTER TO NOTE READ AND TRANSCRIBE DIRECTLY FROM HIS NOTES, BUT THAT HELP IS NO LESS THAN SIX MONTHS AWAY, POSSIBLY LONGER.

Herman J. Vesper  
HERMAN J. VESPER

SUBSCRIBED TO AND SWORN TO BEFORE ME, THIS 1ST DAY OF FEBRUARY 1974  
IN FOUTLAND, VERMONT.

[Signature]  
1st Deputy Clerk of Court  
Feb 10, 1975

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA, )  
Plaintiff-Appellee )


v. )

Docket No. 74-1029

JOHN P. CLEARY, )  
Defendant-Appellant )

CERTIFICATE OF SERVICE

I do hereby certify that on the 19th day of March, 1974,  
I made service of the PETITION FOR REHEARING EN BANC upon  
the UNITED STATES OF AMERICA, by mailing two copies of the  
same to its attorney of record, George W. F. Cook, United States  
Attorney, Federal Courthouse, Rutland, Vermont.

  
Peter M. Cleveland  
Attorney for John P. Cleary

Address:

Box 123  
Essex Junction, Vermont 05452